# STATE OF MICHIGAN

# COURT OF APPEALS

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FAYE RICE,

Plaintiff-Appellant,

v

THE TROWBRIDGE, an assumed name for MCDONNELL III LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP and FOREST CITY RESIDENTIAL MANAGEMENT, INC., a foreign corporation,

Defendant-Appellee.

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UNPUBLISHED
August 22, 2006

No. 266050
Oakland Circuit Court
LC No. 04-61553-NO

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this premises liability case. Because we find questions of fact concerning whether the condition complained of actually caused plaintiff's fall and, if so, whether the condition was open and obvious, we reverse.

Plaintiff, 94, is a tenant of the Trowbridge, a senior citizen/assisted living facility. On March 25, 2003, as plaintiff walked through an aisle between an end table and a sofa in the lobby of the facility she tripped over a lamp cord, falling and incurring injuries as a result. According to plaintiff, the lamp cord blended with the carpeting and created an unreasonable hazard in a highly trafficked area. Plaintiff filed a two-count complaint, alleging negligence and breach of statutory duty against defendants, the owner and the management company for the facility.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) asserting that application of the open and obvious doctrine required dismissal of plaintiff's complaint and the trial court agreed. We review de novo a trial court's order granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In reviewing such a motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim

or defense may be granted under this court rule when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

On appeal, plaintiff first asserts that the trial court erred in resolving questions of fact in a light most favorable to defendants. We agree.

Whether plaintiff tripped while walking through an aisle way between the end table and sofa was debated before the trial court. Defendant provided the court with photographs showing a space of only a few inches between the end table and sofa and contended that the configuration of the furniture as depicted in the photographs was the same configuration encountered by plaintiff on the date of her fall. Richard Wisdom, a security guard on defendant's premises, initially testified that other than the position of the coffee table, photographs of the area where plaintiff fell depicted the same configuration of furniture as on the date of the fall, but later admitted he could not tell with 100% surety that the furniture configuration was the same. Plaintiff, however, testified that when she tripped over the lamp cord, she was walking through a "nice big space", one that was "enough to walk by comfortably" when she fell. According to plaintiff, the photographs provided to the trial court depicted a configuration different than what the actual configuration was on the day of her fall.

In making its ruling, the trial court noted defendant's argument that the furniture was configured such that defendant would not expect someone to squeeze through the furniture. The trial court indicated, "[I] think perhaps. . .that's probably going to be the most crucial issue, as far as the court is concerned." The trial court, then, acknowledged the materiality of the furniture configuration. The trial court also acknowledged that the photographs were taken some eight months after the accident, but that "[T]he pictures speak for themselves. I'm satisfied the configuration was the same and therefore I would grant the motion to dismiss." This rationale is erroneously based upon the trial court's viewing the evidence in a light most favorable to defendants—the moving parties. To find that the configuration was the same, the trial court would necessarily have to weigh the credibility of the parties and witness and find, as a matter of fact, that plaintiff's testimony was not credible. "[A] trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition." *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). Moreover, this Court will be liberal in finding a genuine issue of material fact that requires a trial to resolve. *Id.* Given that the trial court's ultimate ruling was based upon a factual dispute it resolved in favor of defendants, summary disposition was improper. See *Corley, supra.*[1]

Plaintiff also contends that the trial court erred in failing to rule that MCL 554.139 applies to defendant. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). When interpreting statutes, our primary goal is to determine and give meaning to the Legislature's

[1] Conflicting testimony was also presented as to whether a lamp cord actually caused plaintiff's fall. This also appears to be a question of material fact resolved by the trial court, albeit in plaintiff's favor.

intent. *Inter Co-op Council v Tax Tribunal Dept of Treasury*, 257 Mich App 219,223; 668 NW2d 181(2003). The words of a statute provide the most reliable evidence of legislative intent and where that language is unambiguous-no further judicial construction is required or permitted, and the statute must be enforced as written. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
> (a) That the premises and all common areas are fit for the use intended by the parties.
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

It has been held that the open and obvious doctrine cannot serve to deny liability with respect to a leased or licensed premises if the premises present a material breach of a specific statutory duty imposed upon owners of such premises. See, *Benton v Dart Properties, Inc,* 270 Mich App 437; 715 NW2d 335 (2006).

Although the parties briefed and argued the issue below, the trial court did not address it. Because a statutory duty exception or avoidance of the open and obvious danger doctrine requires both factual and legal development, we remand to the trial court for a determination regarding the applicability of the open and obvious defense is appropriate. See, *O'Donnell v Garasic*, 259 Mich App 569, 581-582; 676 NW2d 213 (2003). On remand, we direct the parties and the court to address the issue in accordance with applicable law.

Plaintiff next argues that the trial court erred in finding the hazard was open and obvious. Assuming, without deciding, that the open and obvious defense is available to defendants, we agree. In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A tenant is an invitee of the landlord. *Stanley v Town Square Coop*, 203 Mich App 143, 149; 512 NW2d 51 (1993).

Possessors of land have a legal duty to exercise reasonable care to protect their invitees from dangerous conditions on the land if they: (a) know or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fail to exercise reasonable care to protect them against the danger. *Riddle v McLouth Steel Products*, 440 Mich 85, 93; 485 NW2d 676 (1992). If a condition is "open and obvious," however, this duty does not apply unless the condition poses an unreasonable risk of harm. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

The test for an open and obvious danger is whether "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Id.* Because the test is objective, the court looks not to whether plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his position would foresee the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

In the instant matter, plaintiff testified that she did not see the lamp cord prior to her fall because it blended with the carpet. Although Mr. Wisdom testified that the lamp cord was not in the walkway, he also indicated, upon review of the photographs, that the cord kind-of blends in with the color of the carpeting. This testimony presents a material question of fact as to whether the cord, on the date of plaintiff's fall, was open and obvious. This is especially so given the factual dispute as to the configuration of the furniture on the date of plaintiff's fall. It would be impossible to determine simply by looking at photographs taken eight months after the fall that the cord is easily observable upon casual inspection when it is not clear whether the cord and furniture placement were the same on the date of the fall. Summary disposition based upon the open and obvious doctrine would thus be inappropriate.[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

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[2] Because we conclude that questions of fact exist concerning whether the lamp cord was open and obvious, we do not reach plaintiff's argument concerning whether the cord presented any special aspects that would render the condition unreasonably dangerous. "Special aspects" provide exceptions to the generally accepted theory that a landowner has no duty to protect invitees from open and obvious conditions. *Lugo, supra; Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Thus, a "special aspects" analysis is pertinent only if the condition complained of were deemed open and obvious.